Unjust Dismissal of Employees at Will: Are Disclaimers a Final Solution?

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I. Introduction

Despite the description of the 1980’s as the “Age of the Entrepreneur,” the majority of persons in the American labor force today work in the private sector and are thus subject to the protean common law doctrine of employment at will.

1. Parrish, Why Many Women Opt to Go It Alone, N.Y. Times, Feb. 9, 1986, at C2, col. 3. “President Reagan has called this [decade] the ‘Age of the Entrepreneur’ . . . [a time when the] most dynamic segment of the United States’ economy [consists of] small entrepreneurial businesses . . . .” Id.

2. A current analysis of the United States work force reveals a total 1985 population, including those persons over 16 years of age and members of the United States Armed Forces, but excluding inmates of penal institutions and patients in public and privately owned sanitariums, of 180 million. See Current Labor Statistics, 109 MONTHLY LAB. REV. 57, 80 (Nov. 1986). The actual labor force, consisting of all employed or unemployed civilians plus members of the Armed Forces stationed in the United States, but excluding those persons who are retired, engaged in their own housework, disabled, discouraged from actively seeking employment, voluntarily idle, or students, was 117 million people. See id. Of this total, 107 million civilians were actively employed. See id. Approximately 16 million of these workers were employed in the public sector, working for state or the federal government. See id. The total number of workers in the private sector, excluding agricultural workers, was approximately 88 million. See id. The percentage of unionized wage and salary workers in the private sector has declined in recent years. See Adams, Changing Employment Patterns of Organized Workers, 108 MONTHLY LAB. REV. 25, 26 (Feb. 1985). In 1980, for example, out of approximately 71 million of these workers, 14 million or 20% were unionized. See id. In 1984, however, the number of employed wage and salary workers in the private sector rose to 75 million, but only 12 million or 16% reported union participation. See id. One commentator predicted that union participation by non-agricultural workers will decline further to 10% of the work force. See Finkin, In Defense of the Contract at Will, 50 J. AIR L. & COM. 727, 727 (1985) [hereinafter Finkin]; see also Doyle, Area Wage Surveys Shed Light on Decline in Unionization, 108 MONTHLY LAB. REV. 13 (Sept. 1985) (describing decline in union strength and popularity). But see N.Y. Times, Sept. 1, 1985, at A26, col. 1 (Lane Kirkland, leader of AFL-CIO, predicts resurgence in unions). In sum, the “tide of unionization has been receding rather than advancing, leaving an ever-increasing number of employees without protection against unjust discharge.” Stieber, Most U.S. Workers Still May Be Fired Under the Employment-at-Will Doctrine, 107 MONTHLY LAB. REV. 36 (May 1985) [hereinafter Stieber].

3. Employment at will describes a situation in which the employer/employee relationship is severable at any time by either party for any or no reason and without future consequences. See, e.g., L. LARSON & P. BOROWSKY, UNJUST DISMISSAL § 1.01, at 1-2 (1985) [hereinafter LARSON & BOROWSKY]; DeGiuseppe, The
Current scholarly and popular debates over the continued application of this doctrine reveal the inherent conflict found in any...


5. The increasing controversy concerning the viability of the employment at will doctrine has prompted authors to forewarn managers of potential problems that could arise after employee terminations. See, e.g., R. Baxter & G. Siniscalco, Manager's Guide to Lawful Terminations 77-108 (1983); R. Brady, Employment at Will: How to Avoid Being Sued When You Hire, Fire & Discipline 18-25 (1983) [hereinafter Brady]; T. Condon, "Fire Me & I'll Sue!" A Manager's Survival Guide to Employee Rights 59-65 (1984-85); see also Andresky, Fear of Firing, Forbes, Dec. 2, 1985, at 85 (managers are encouraged to leave employees "fretting" about the security of their jobs); English, Why It's Harder to Fire Workers These Days, U.S. News & World Rep., June 4, 1984, at 96-97 (United States map depicting current status of employment at-will doctrine by state); Rose, Employment Contracts: Difficult To get but They're Great to Have, Wall St. J., Aug. 2, 1985, at 15, col. 4 (advocating employment contracts to preserve executives' rights and bargaining power); Labor Letter, Wall St. J., July 30, 1985, at 1, col. 5 (employer disclaimer regarding any job security gains additional weight in determining no cause of action for wrongful discharge); Jacobs, Changes in Employment Laws Can Trap Unwary Companies, Wall St. J., Feb. 4, 1985, at 25, col. 1 (employers can avoid dismissal suits by maintaining careful documentation of employee records and improving general personnel procedures) [hereinafter Jacobs]. But see W. Outten, The Rights of Employees 3-43 (1984) (describing expansion of at-will employees' rights in current labor market) [hereinafter Outten]; Foegen, Pink Slips for Troublemakers: Employees Fight the Firing Squad, Bus. & Soc'y Rev. 19, 22
developing area of the law. Employers claim that any limitation on their right to hire and fire at will for any cause or for no cause will adversely affect their profitability and ultimately the health of the entire economy. Employees, however, assert their actual and perceived rights to fair treatment during the hiring process, during

(Winter 1984) ("Ultimately...[employment at will] 'boils down to' mutual integrity...[E]mployees deserve protection against casual termination...Employers likewise deserve recourse...against unreasonable judicial harassment").

6. See The Rights of Individual Workers, supra note 4, at 1105. "[Contradictory decisions in employment at will cases] are the hallmark of a body of law in transition, particularly when courts attempt quietly to abandon outmoded doctrines by invoking other doctrines as exceptions or limitations." Id.; see also Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71, 417 A.2d 505, 511-12 (1980). In Pierce, the New Jersey Supreme Court recognized "the capacity of the common law to develop and adapt to current needs," and held that an employee has a cause of action for wrongful discharge when the discharge is contrary to public policy. 84 N.J. at 71, 417 A.2d at 511-12.

7. See Employee Rights, supra note 3, at 3; see also Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), rev'd on other grounds, Hutton v. Watlers, 132 Tenn. 527, 179 S.W. 134 (1915). The Payne court stated: "All may dismiss their employee[s] at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong," 81 Tenn. at 519-20, thus representing the quintessential idea underlying the traditional employment at will principle.

8. Union employees can pursue grievance procedures established in collective bargaining agreements. See Stieber, supra note 2, at 36. These agreements typically prohibit dismissal in the absence of "just cause." See Outten, supra note 5, at 5. Public sector employees may seek constitutional protection if an employer violates a fundamental right of an employee. See id. at 7. Even traditional at-will employees may seek the protection of federal and state statutes which prohibit discrimination or different treatment based upon specific characteristics. See infra note 13.

9. The recently developed cause of action for wrongful or abusive discharge pushes the employment relationship to its furthest limits by providing that an employee should have protection against an employer's unfair or capricious termination of the employee's job. See infra notes 143-65. The concept of fairness in employment has progressed since contrary Supreme Court decisions during the early 1900's. See infra note 45 and accompanying text. For example, in Coppage v. Kansas, 236 U.S. 1 (1915), Justice Day stated, "[t]he law should be as zealous to protect the constitutional liberty of the employ[ee] as it is to guard that of the employer...[i]t should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed." 236 U.S. at 40 (Day, J., dissenting) (holding Kansas statute unconstitutional that forbade employers from making a non-union agreement a condition of employment). But see Finkin, supra note 2, at 731-33 (stating that employment at will is fair, efficient and minimizes governmental interference with freedom of contract). It should be noted that employment terminable at will may also benefit the employee, since "[i]t also allows employees reciprocally to monitor managerial performance. If employees become dissatisfied, if management behaves arbitrarily or abusively, the employee is free to quit." Id. at 731.

10. See Jacobs, supra note 5, at 25, col. 1; see also Outten, supra note 5, at 13-26.
the course of their employment\textsuperscript{11} and after their discharge.\textsuperscript{12} Concern about equitable treatment in employment has prompted Congress to enact protective legislation\textsuperscript{13} for certain segments of the workforce.\textsuperscript{14} Nevertheless, the unsettled question of whether the employment at will doctrine is viable continues to affect every employer/employee relationship that is not governed by such protective legislation or collective bargaining agreements.

Courts have addressed four theories that have substantially weakened the impact of the employment at will doctrine in wrongful discharge suits.\textsuperscript{15} These theories include: (1) the public policy exception to arbitrary termination;\textsuperscript{16} (2) the implied employment contract that preserves employment unless termination is for "cause";\textsuperscript{17} (3) the tort of "abusive discharge";\textsuperscript{18} and (4) the implied covenant of good faith and fair dealing.\textsuperscript{19}

This Note maintains that courts should use a balancing approach in the analysis of wrongful discharge disputes. It first discusses the historical foundations of the employment at will doctrine.\textsuperscript{20} It then critically examines the current status of the four theories used to


\textsuperscript{12} Wrongful discharge occurs when an employer violates the following limitations to her discretion to fire an employee: "(1) 'just cause' requirements endemic to public sector employment and union membership; (2) statutory restrictions on employment-related discrimination based on age, sex, race, national origin, handicap, or related categories, and on retaliation against employees for protected activity; and (3) judicially established limitations rooted in public policy or in a broad view of an employee's rights under an employment contract." OUTTEN, supra note 5, at 35-36; see also Employee Rights, supra note 3, at 16-23; infra note 13.

It next analyzes four possible resolutions to employer/employee conflicts in the context of employment terminations. These resolutions include: (1) unionization of those employees who want protection; (2) judicial decree to define the current status and direction of the law, including disclaimers in personnel applications or manuals; (3) voluntary approaches by employers that would insure fair treatment and include arbitration of disputes; and (4) a legislative solution that would balance the rights of employees with those of employers, to promote equitable treatment of the workforce without detracting from robust economic performance.

II. Origins and Current Status of the Employment at Will Doctrine

The following section traces the historical development of the employment at will doctrine from English feudal law to its incorporation into American law. The next section discusses the four theories currently used by terminated employees in wrongful discharge suits.

A. Historical Foundations of Employment at Will

The development of the employment at will doctrine had its origin in principles of English law derived from feudal theories of master and servant. The "English Rule," as articulated by Sir William Blackstone, raised a presumption that the employer had hired the employee for one year. This presumption was limited by the prescription against arbitrary termination set forth in the Statute of

21. See infra notes 57-182 and accompanying text.
22. See infra notes 183-223 and accompanying text.
23. See infra notes 186-91 and accompanying text.
24. See infra notes 192-201 and accompanying text.
25. See infra notes 202-11 and accompanying text.
26. See infra notes 212-23 and accompanying text.
27. English feudal law gradually changed as the agrarian economy became more industrialized. See Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118, 119-22 (1976) (overview of development of English feudal law); see also Larson & Borowski, supra note 3, § 2.02, at 2-2; Employee Rights, supra note 3, at 3-5.
29. Blackstone's rule applied to all classes of servants and stated: "If the hiring be general without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done as when there is not . . . ." 1 W. Blackstone, Commentaries *425.
Labourers. In addition, contrary manifestations of the parties rebutted this presumption of one-year employment as long as the employment agreement incorporated reasonable notice. Modern English labor statutes have incorporated reasonable notice of termination.

Early American cases rejected the one-year employment presumption. Jurisdictions diverged, however, in the way they determined the length of the employment contract. Some jurisdictions followed the presumption that the employment relationship lasted at least for the duration of the specified payment period, while others considered the relationship in accordance with the facts of each case and the intent and customs of the parties. The transformation of the domestic servant to the commercial employee, industrial expansion and the acceptance of a *laissez faire* economic theory contributed further to tension in the definition of the employment relationship. In 1877, Horace G. Wood proposed a harsh solution to this controversy. In his treatise, Wood characterized employment relationships as terminable at will. In 1895, the New York Court of Appeals...
adopted this new "American Rule" in *Martin v. New York Life Insurance Co.* In the early 1900's, the Supreme Court also adopted the rule.

The first statutory exception to the rule was the enactment of the National Labor Relations Act in 1935, which limited the employment at will doctrine in two ways. It protected employees from dismissal in retaliation for their union activity and preserved employee rights to bargain collectively for advantageous employment contracts. An additional federal statutory protection for employees from an employer's unfettered right to fire was Title VII of the Civil Rights Act of 1964, which prohibited discriminatory dismissal.

**B. Doctrines Limiting Employment at Will**

Judicial inroads into the employment at will doctrine have included the "public policy" exception, implied contractual protection and the "abusive discharge" cause of action. State legislative inroads have included the enactment of "whistleblowing" statutes, which

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43. LARSON & BOROWSKY, supra note 3, § 2.04, at 2-6.
44. 148 N.Y. 117, 42 N.E. 416 (1895).
45. The trio of Supreme Court cases which firmly advocated the employment at will rule were *Lochner v. New York*, 198 U.S. 45 (1905), *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915). In each of these cases, state or federal legislation protecting workers was struck down as unconstitutional because the legislation interfered with both the employer's and the employee's right to contract. Justice Pitney, writing for the majority in *Coppage*, holding unconstitutional a Kansas law that prohibited employers from forbidding union membership, stated: "No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances." *Coppage*, 236 U.S. 1, 17 (1915).
46. See supra note 13.
47. See LARSON & BOROWSKY, supra note 3, § 2.05, at 2-11 to -12.
48. Id.
49. See supra note 13.
50. Title VII of the Civil Rights Act of 1964 § 703(a) states that "[i]t shall be unlawful for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex or national origin . . . ." 42 U.S.C. § 2000e-2a(1) (1982).
51. See infra notes 58-82 and accompanying text.
52. See infra notes 83-144 and accompanying text.
53. See infra notes 145-67 and accompanying text.
protect employees from retaliatory discharge when they report illegal activities by employers.\textsuperscript{54} Puerto Rico is the only jurisdiction, however, that has adopted a broad statute requiring "just cause" for termination.\textsuperscript{55} Such model statutes have been proposed on the international level.\textsuperscript{56}

1. The Public Policy Exception to Arbitrary Discharge

An exception to the employment at will doctrine occurs when employees are fired in a way contrary to public policy considerations.\textsuperscript{57} Although one commentator has stated that the public policy exception to the employment at will doctrine sounds in contract,\textsuperscript{58} most commentators describe the exception as a cause of action in tort.\textsuperscript{59} Nevertheless, the term "public policy" is not easily defined.\textsuperscript{60} In order to support a cause of action for retaliatory


\textsuperscript{55} P.R. LAWS ANN. tit. 29, § 185a (Supp. 1983). This unique statute provides the following examples of "good cause for discharge": improper worker conduct; inefficient work performance; repeated violations of reasonable work rules; temporary, full or partial closing of the workplace; reduction in workforce due to technological changes or reductions in product output. See id. § 185b (Supp. 1983). The statute expressly forbids termination due to the whim of the employer or due to a reason unrelated to the workplace. See id. Employees who are wrongfully discharged may be awarded an amount equal to one month's salary plus one week of salary for each year of the employee's service. See id. § 185a (Supp. 1983).

\textsuperscript{56} See Bellace, A Right of Fair Dismissal: Enforcing a Statutory Guarantee, 16 U. Mich. J.L. REF. 207, 210-17 (1983) (discussing an International Labor Organization Convention proposed "just cause" termination referendum for which 125 other countries' representatives voted in favor but the United States' representative opposed) [hereinafter Bellace].

\textsuperscript{57} See A Legislative Function, supra note 4, at 753.

\textsuperscript{58} See The Rights of Individual Workers, supra note 4, at 1102, see also Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 566, 335 N.W.2d 834, 841 (1983) (holding that contractual remedies such as reinstatement and back pay are the more appropriate remedies for wrongful discharge suits).

\textsuperscript{59} See A Legislative Function, supra note 4, at 755-56; The Public Policy Exception, supra note 4, at 1936-37.

\textsuperscript{60} In Palmanee v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981), an employee was discharged both for supplying information to local
discharge, an employee must prove his employer terminated him in violation of a "clear mandate of public policy." Examples of such violations include termination for refusing to commit an unlawful act; for performing an important public duty; or for exercising law enforcement authorities about suspected theft and agreeing to assist in the investigation. 85 Ill. 2d at 130, 421 N.E.2d at 878-79. Justice Simon of the Illinois Supreme Court addressed the difficulty of determining whether this discharge violated public policy:

"The Achilles heel... lies in the definition of public policy. When a discharge contravenes public policy in any way the employer has committed a legal wrong... But what constitutes clearly mandated public policy?... It can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions... The matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed."

Id. at 130, 421 N.E.2d at 878-79 (citations omitted). This all-encompassing definition was sharply criticized as being too broad and an example of judicial overreaching. See id. at 881-86 (Ryan, J., dissenting). However, a possible approach is determining whether the discharge violates the public conscience, because "'public policy' is not a rigidly defined concept... [It is] loose and amorphous, bending as society's needs and values change... [A] 'public policy exception' to a doctrine or principle of law... can be based on either statutory underpinnings or on an inherent sense of justice essential for the purpose of preventing injury to the public." Note, Public Policy Limitations to the Employment-At-Will Doctrine since Geary v. United States Steel Corporation, 44 U. Pitt. L. Rev. 1115, 1121-22 (1983) [hereinafter Public Policy Limitations to the Employment-At-Will Doctrine].


62. See, e.g., Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee's discharge due to his refusal to participate in employer's illegal price-cutting scheme held sufficient grounds to support cause of action in tort against employer); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee's discharge for refusing to perjure himself for employer's benefit violated very essence of California penal statute proscribing such testimony); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (terminated employee had called employer's attention to shortweighing procedures in violation of Connecticut Uniform Food, Drug and Cosmetics Act); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (Law Div. 1978) (x-ray technician refused to follow orders to perform catheterizations for which she was unlicensed). But see Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employee could not establish prima facie case that his termination after 32 years of service for refusing to promote illegal "sweetheart deals" with unions violated any public policy against such deals; this employee was, however, able to proceed on breach of contract theory).

63. See, e.g., Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (employee fired because she did not seek to be excused from jury duty); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (court recognized importance of jury service to the legal process and emphasized that employees should not be fired for serving). "Whistleblowing" by employees on illegal activities of employers is considered fulfilling a public duty. See infra note 54 for a discussion of whis-
a statutory right, such as filing a workman’s compensation claim. Some courts have taken a restrictive view, finding such terminations to be mere violations of an employee’s ‘private’ interests. Other courts, however, have held that certain private interests encompassed by the broad public policy exception are actionable.

telewhistleblowing statutes and related cases. The refusal to violate a professional code of ethics has also been described as fulfilling a public duty. See Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 75-76, 417 A.2d 505, 512-13 (1980). In Pierce, a physician’s refusal to continue research on a controversial drug did not amount to a violation of a medical code of ethics, but if the physician had alleged that the drug was dangerous, her subsequent dismissal would have violated public policy. See id.


65. An employer’s violation of an employee’s purely private interest is not actionable under the public policy exception. See, e.g., Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). The court “balanced” the physician’s need to abide by her ethical code with the employer’s need to continue research on a questionable product. Id. at 75-76, 417 A.2d at 514.

This broad basis for the exception gives the courts great flexibility in examining wrongful termination suits. This flexibility, however, sometimes produces inconsistent results. One result of this inconsistency is that professional and managerial employees often prevail in wrongful discharge actions. Low-level, clerical employees seldom prevail. This ad hoc judgment may put a terminated employee at the mercy of judicial opinion.

Approximately twelve states refuse to permit a public policy exception to the employment at will doctrine. One of the arguments against increased use of the public policy exception is that the burden of excessive or frivolous litigation by employees against employers

(female employee wrongfully discharged for refusing her supervisor's sexual advances). In Monge, the New Hampshire court balanced the employee's need for job security against the employer's interest in continuing his business with a minimum of disruption, and ultimately held that the employee's discharge violated public policy because termination motivated by bad faith, malice or retaliation is not in the public interest. See id. at 133, 316 A.2d at 551; see also Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (female employee could not be fired for resisting employer's sexual advances); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (hospital employee's discharge for refusing to bare her buttocks during a staff stage production held in violation of Arizona's indecent exposure law and contrary to public morals).

67. Courts have great flexibility in examining wrongful termination suits. See A Legislative Function, supra note 4, at 754-67.


69. The Public Policy Exception, supra note 4, at 1936-49. The American labor force is characterized as a primary market of employees in predominantly professional and managerial capacities in the upper tier and non-managerial white and blue collar employees in the lower tier. See id. at 1939. The secondary market is comprised of employees in low-wage, high-turnover jobs that are disproportionately filled by women and minorities. See id. at 1938-40.

70. See id. at 1949.

71. See id.

72. The following states rigidly conform to the traditional employment at will doctrine and permit few, if any, exceptions for terminations in violation of public policy: Alabama, see Reich v. Holiday Inn, 454 So. 2d 982 (Ala. 1984); Colorado, see, Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978) (Colorado Court of Appeals has expressly refused to recognize public policy exception while reserving possibility of doing so in the future); District of Columbia, see Ivy v. Army Times Publishing Co., 428 A.2d 831 (D.C. 1981); Georgia, see Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978) (courts in Georgia have continued to steadfastly reject any public policy exception); Iowa, see Abriz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978); Louisiana, see Gil v. Metal Serv. Corp. 412 So. 2d 706 (La. Ct. App.), writ denied, 414 So. 2d 379 (La. 1982); Maine, see MacDonald v. Eastern Fine Paper, Inc., 485 A.2d 228 (Me. 1984); Mississippi, see Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Nebraska, see Beaver Lake Ass'n v. Beaver Lake Corp., 200 Neb. 683, 264 N.W.2d 871 (1978); New York, see Murphy v. American Home
will frustrate both the judicial and economic system.\textsuperscript{73} In \textit{Murphy v. American Home Products Corp.},\textsuperscript{74} the New York Court of Appeals refused to acknowledge the employee's discharge as wrongful, despite the fact that he was terminated for reporting repeated accounting improprieties to senior management.\textsuperscript{75} The court found the accounting improprieties to be a "matter of judgment."\textsuperscript{76} The court also characterized the problem of retaliatory dismissal for employee conduct that is protected by public policy as a problem best resolved by the legislature.\textsuperscript{77}

Partly in response to the court's decision, the legislature approved the passage of the "Whistleblower Protection" bill,\textsuperscript{78} which Governor Cuomo signed into law on August 1, 1984.\textsuperscript{79} The law protects both private and public employees from retaliation for reporting a "violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety."\textsuperscript{80} The statute's narrow proscription against retaliatory discharge of employees who report employer violations involving the public safety does not protect employees who report employers' questionable or illegal business practices.\textsuperscript{81} Several states have enacted legislation that provides broader protection for employees who "blow the whistle" on their employers.\textsuperscript{82}

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\textsuperscript{73} See Finkin, supra note 2, at 732.
\textsuperscript{75} See Finkin, supra note 2, at 732.
\textsuperscript{76} Id. at 297-98, 448 N.E.2d at 87, 461 N.Y.S.2d at 233.
\textsuperscript{77} Id. at 300, 448 N.E.2d at 89, 461 N.Y.S.2d at 235.
\textsuperscript{78} See N.Y. LAB. LAW § 740 (McKinney Supp. 1987); see also N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1987).
\textsuperscript{79} 1984 N.Y. Laws 660.
\textsuperscript{80} See N.Y. LAB. LAW § 740(2)(a) (McKinney Supp. 1987); see also N.Y. CIV. SERV. LAW § 75-b(2)(a) (McKinney Supp. 1987).
\textsuperscript{82} California, for example, protects employees from wrongful discharge when they disclose information to a governmental agency if the employee has reasonable belief that the employer has violated a state or federal law or regulation. See CAL. LAB. CODE § 1102.5(a), (b) (West Supp. 1987). Another California statute protects employees from retaliatory discharge if they assert their rights under the jurisdiction
2. The Implied Employment Contract

Implied employment contracts that may protect employees against arbitrary discharge are usually construed from employer representations of a specified length of employment or a “good cause” standard for dismissal. The employment at will doctrine, however, does not apply to employment contracts that expressly indicate that employment will last for a specific length of time. Such express contracts protect employees from premature dismissal unless the breach was based upon legal excuse such as “good cause.”

of the State Labor Commissioner. See CAL. LAB. CODE § 98.6 (West 1971 & Supp. 1987). Connecticut statutes protect employees who report a suspected violation of any federal, state or municipal law by their employers, and protect those employees who are asked to testify before a public body in charge of such investigation. See CONN. GEN. STAT. § 31-51m (1983). In addition, Connecticut public service employees are protected if they report illegal activities to the Department of Public Utility Control. See 1985 Conn. Acts 85-245 (Reg. Sess.). Employees of the State of Connecticut are given even greater protection because they can report corruption, unethical practices, state law regulation violations, gross waste of funds, mismanagement, abuse of authority, or danger to the public safety without fear of retaliatory discharge. See CONN. GEN. STAT. ANN. § 4-61dd (West Supp. 1986). Maine statutes protect public and private employees if they either report a statutory violation, are asked to participate in an investigation or refuse to carry out a command which violates a state or federal law. See ME. REV. STAT. ANN. tit. 26, §§ 831-840 (Supp. 1987). Michigan statutes protect employees who report a violation of law or who are asked to participate in an investigatory process. See MICH. COMP. LAWS ANN. § 15.361-369 (West 1981).

83. LARSON & BOROWSKY, supra note 3, § 3.04, at 3-10 to -19.
84. See id., § 3.01, at 3-2.
85. The term “good cause” has never been clearly defined—however, good cause for termination has been found when employees are caught lying, see Rozier v. St. Mary’s Hosp., 88 Ill. App. 3d 994, 411 N.E.2d 50 (1980); fighting, see Grozek v. Ragu Foods, Inc., 63 A.D.2d 858, 406 N.Y.S.2d 213 (4th Dep’t 1978); destroying employer’s property, see Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668 (Ind. Ct. App. 1984); or are found to be incapable of performing their job. See Stephens v. Justiss-Mears Oil Co., 300 So. 2d 510 (La. Ct. App. 1974). An employer’s defense to an accusation of wrongful discharge is to assert a claim that the termination was for good cause. See LARSON & BOROWSKY, supra note 3, § 9.02, at 9-2 to -5. A question arises as to the determination of the employee’s conduct as sufficiently inappropriate to deserve discharge. See id., § 9.02, at 9-5 to -12. Courts have expressed two views regarding this determination. First, a court may consider the employer’s good faith subjective determination of the employee’s conduct, which can result in unfair decisions, because the employer reaches the final decision as to the severity of the employee’s conduct. See, e.g., Simpson v. Western Graphics Corp., 293 Or. 96, 643 P.2d 1276 (1982) (two employees accused of making threats against other workers were investigated by employer and ultimately discharged solely upon basis of investigation; court refused to independently determine if threats were actually made). The second and fairer view is that the decision to fire for good cause should be subjected to a certain level of judicial scrutiny. See Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). In Toussaint, the court advocated a review of conflicting facts by the
Under the modern judicial approach, courts find that policies in personnel handbooks and oral representations by employers can create an implied-in-fact contract of employment. In addition, an implied covenant of good faith and fair dealing in employer/employee relationships can create an implied-in-law employment contract. This creation of an implied contract of employment has enabled employees to prevail in arbitrary discharge suits. Most courts,
however, refuse to infer such a contract without first examining the
totality of the circumstances in each case and applying an analytical
framework to those facts.\textsuperscript{89}

Under the traditional view of personnel handbooks and other
written employment information, courts hold such books are “never
part of an employee contract, because they may be unilaterally
amended by the employer and . . . the employee has not given
independent consideration for the promises they contain.”\textsuperscript{90} In
addition, this view is enforced by the doctrine of mutuality,\textsuperscript{91} although
in general courts no longer adhere to this doctrine.\textsuperscript{92} In the states

\textsuperscript{89} In \textit{Weiner}, the New York Court of Appeals articulated a four-prong test
to determine whether an express employment contract was created and if termination
of the employee constituted a breach of that contract. First, the employee must
rely upon the employer’s promise not to discharge the employee except for cause
when employee entered employment or left his previous employer based upon this
reliance. See 57 N.Y.2d at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197. Second,
the assurance given to the employee must be incorporated into a written employment
application (or handbook). \textit{See id.} Third, the employee must have rejected other
offers of employment in reliance upon this assurance. \textit{See id.} Finally, the court
required that the employer emphasize compliance with just cause termination
procedures, such as probation periods or impartial hearings. \textit{See id.} If these four
requirements are not met, the employee cannot sue for unjust dismissal based upon
an implied or express employment contract. Therefore, in \textit{Murphy v. American}
the New York Court of Appeals rejected Murphy's contention of an implied “just
cause” provision for discharge in his employment handbook, because an “express
limitation” is needed on the employer’s right to termination. 58 N.Y.2d 293, 305,
the strict \textit{Weiner} test and failed to prove a breach of an implied employment
contract. \textit{See id.} at 305, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.

\textsuperscript{90} \textit{See} \textit{LARSON} & \textit{BOROWSKY, supra note 3, § 8.02, at 8-3. The Michigan
Supreme Court, however, has stated that when employers announce a personnel
policy “presumably with a view to obtaining the benefit of improved employee
attitudes and behavior and improved quality of the workforce, the employer may
not treat its [policy] as illusory.” \textit{Toussaint}, 408 Mich. at 619, 292 N.W.2d at
895. Inadequacy of consideration is another traditional argument against enforcing
handbook promises because the employment contract existed when the employee
provided his labor and services in consideration for the salary paid by the employer.
\textit{See Note, Implied Contract Rights to Job Security}, 26 STAN. L. REV. 335, 351-
52 (1974). Additional consideration was required for the employer to be bound by
his additional promises. \textit{See id.}

\textsuperscript{91} \textit{See} \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 79 (1980). Mutuality of ob-
ligation is not required for an enforceable contract as long as there is adequate
consideration. \textit{See id.} The fact that an employee may quit at any time does not
adversely affect an employer’s promise not to terminate unless for cause. \textit{See Pine
River State Bank v. Mettille}, 333 N.W.2d 622, 629 (Minn. 1983).

\textsuperscript{92} \textit{See id.} at 629. In \textit{Pine River}, the Minnesota Supreme Court found that
that adhere to the traditional contract analysis of employee handbooks, courts find such statements by employers to be broad

an employer's promises of job security in its handbook could not be defeated because of a lack of mutuality, 333 N.W.2d at 629. The court stated that "[t]he demand for mutuality of obligation, although appealing in its symmetry, is simply a species of the forbidden inquiry into the adequacy of consideration . . . ." Id. at 629. The court reiterated its holding in an earlier case that "the concept of mutuality in contract law has been widely discredited and the right of one party to terminate a contract at will does not invalidate the contract." Id. (citing Cardinal Consulting Co. v. Circo Resorts, 297 N.W.2d 260, 266 (Minn. 1980)); see J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 4-22 (2d ed. 1977) (stating that one consideration, such as employee's promised service, may support several promises, such as employer's promise of salary, bonuses, or other fringe benefits). The doctrines of mutuality and adequacy of consideration are considered rules of construction, not of substance, when determining the rights of the parties. See Toussaint, 408 Mich. at 600, 292 N.W.2d at 885.

93. States which uphold the traditional analysis of employee handbooks and do not include these manuals in employment contract analysis are: Alabama, see White v. Chelsea Indus., Inc., 425 So. 2d 1090 (Ala. 1983) (employee handbooks do not become employment contracts upon dissemination and receipt); Delaware, see Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982) (employee handbook represents expression of company policy); Florida, see Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983) (employer's merit review policies did not establish implied contract) (but see Falls v. Lawnwood Medical Center, 427 So. 2d 361 (Fla. Dist. Ct. App. 1983) (personnel policies could be part of employment contract)); Georgia, see Buice v. Gulf Oil Corp., 172 Ga. App. 93, 322 S.E.2d 103 (1984) (employer's policy of rehabilitating alcoholics did not protect terminated employee who suffered from alcoholism); Idaho, see MacNeil v. Minidoka Memorial Hosp., 108 Idaho 588, 701 P.2d 208 (1985) (employee fired after only receiving oral warning was not protected from discharge by employer's policy of issuing written warnings before termination) (MacNeil appears to be reversing earlier trend permitting expansive reading of employee handbooks as contracts, see Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977)); Indiana, see Mead Johnson & Co. v. Oppenheimer, 458 N.E.2d 668 (Ind. Ct. App. 1984) (no implied contract of employment even when employee handbook outlined termination procedures); Kansas, see Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976) (no implied contract of employment established by handbook policy of no termination unless for cause); Louisiana, see Williams v. Delta Haven, Inc., 416 So. 2d 637 (La. Ct. App. 1982) (employer not bound to follow termination proceedings outlined in policy); Mississippi, see Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985) (employment contract which expressly established ground rules for termination could not be modified by informal policies); Montana, see Gates v. Life of Montana Ins. Co., 196 Mont. 178, 638 P.2d 1063 (Mont. 1982) (employee handbook distributed two years after commencement of employment could not have been bargained for and thus was unilateral statement of policy); New York, see Murphy v. American Home Prods., Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (court stated that handbook provisions created no implied contract of employment but could be analyzed to determine whether express contract existed between the parties); North Carolina, see Griffin v. Housing Auth. 62 N.C. App. 556, 303 S.E.2d 200 (1983) (personnel policies are unilaterally adopted by the employer and are not part of any employment contract); Tennessee, see Graves v. Anchor Wire Corp., 692 S.W.2d 420 (Tenn.
statements of policy, not promises upon which the employee may rely. In addition, the employer can disavow any of the apparent promises in such employee literature by publishing a prominent disclaimer with the material. The disclaimer reaffirms the employer’s ability to terminate at will, despite any apparent statements to the contrary in the handbook.

Ct. App. 1985) (employee handbooks do not provide sufficient guarantees to constitute employment contracts for other than indefinite term); Texas, see Molder v. Southwestern Bell Tel. Co., 665 S.W.2d 175 (Tex. Ct. App. 1983) (employee handbooks are nothing more than guidelines; handbooks do not limit employer’s right to fire at will); Wisconsin, see Ferraro v. Koelsch, 119 Wis. 2d 407, 350 N.W.2d 735 (Wis. Ct. App.), aff’d, 124 Wis. 2d 154, 368 N.W.2d 666 (Wis. 1984) (employment manual did not create implied contract of employment because employee signed disclaimer and did not give additional consideration for employer’s promises).

94. See Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976). In Johnson, the Kansas Supreme Court stated that: [T]he manual was not published until long after plaintiff’s employment. It was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant’s unilateral act of publishing company policy. Id. at 52, 551 P.2d at 782.

95. Such specific employer promises, however, may induce a prospective employee to accept an initial employment offer or may induce better production or improved employee attitudes. See, e.g., Toussaint, 408 Mich. at 619, 292 N.W.2d at 894-95.

96. An employer’s prominent disclaimer as to any modification of the traditional employment at will doctrine is a “protection” that is becoming more popular. See Wall St. J., July 30, 1985, at 1, col. 5 (Labor Letter). Such a disclaimer would read as follows:

The Company retains the right to change, modify, suspend, interpret or cancel in whole or in part any of the published or unpublished personnel policies or practices of the Company, without advance notice, in its sole discretion, without having to give cause or justification or consideration to any employee. Recognition of these rights and prerogatives of the Company is a term and condition of employment and of continued employment.


97. The predominant claim asserted by terminated employees is not that their employment was “permanent” but that their employer did not follow termination procedures outlined in the handbook such as probationary periods, serial warnings or impartial hearings. See, e.g., Leikvold v. Valley View Comm. Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo. Ct.
Some courts, however, have considered all the circumstances and acts of the parties in order to establish whether something other than the traditional terminable at-will relationship existed. This modern approach questions whether "a reasonable person looking at the objective manifestations of the parties' intent [would] find that they had intended this obligation to be part of the contract." The employee's receipt of the literature or acknowledgement of an oral assurance need not come directly at the outset of employment. The employee's continued employment is sufficient consideration to support later promises of job security. General policy statements, however, do not confer additional rights.

In *Finley v. Aetna Life and Casualty Co.*, for example, the Connecticut Supreme Court decided a case involving the alleged wrongful termination of a man who had worked for twenty-four years with the Aetna Life & Casualty Company. The plaintiff had received mostly favorable evaluations over the course of his em-

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99. LARSON & BOROWSKY, supra note 3, § 8.02, at 8-4. Indeed, courts have noted that the employment at will presumption does not prevent the parties from contracting some other form of employment relationship. See Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983).

100. The Michigan Supreme Court has noted that an employer creates a situation "'instinct with an obligation' " of fair and consistent application when it issues an employee handbook, regardless of when the employee actually becomes aware of the policies explained therein. See *Toussaint*, 408 Mich. at 613, 292 N.W.2d at 892 (citation omitted); see also *Employee Handbooks*, supra note 86, at 210.

101. Courts have stated that the requirement of independent consideration for an employer's later promise of job security is more a rule of construction than of substance. See, e.g., Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917, 920 (1981); Pine River State Bank v. Mettille, 333 N.W.2d 622, 629 (Minn. 1983).

102. The Minnesota Supreme Court has stated that as a matter of contract law, "'[a]n employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer." *Pine River State Bank*, 333 N.W.2d at 626.

103. 5 Conn. App. 394, 499 A.2d 64 (1985), *rev'd*, 202 Conn. 190, 520 A.2d 208 (1987). The Connecticut Supreme Court reversed the Connecticut Appellate Court's decision ordering a new trial for the plaintiff and reinstated the jury verdict for the defendant employer under the general verdict rule. See 202 Conn. at 194, 520 A.2d at 211.

104. 202 Conn. at 192, 520 A.2d at 210.
In addition, because of Aetna’s personnel manual and several oral promises, the plaintiff believed that he could not be discharged except for cause. Furthermore, Finley had relied to his detriment upon his employer’s promises by turning down other potentially lucrative job offers. Nevertheless, after a dispute among personnel in Finley’s department, Finley’s supervisor fired him.

The Connecticut Supreme Court first analyzed the appellate court’s decision of whether the statute of frauds applied to employment contracts for an indefinite term. These contracts did not need the signed, written agreement specified in the statute because they could be completed within one year if the employee died or became disabled. The court held that the appellate court did not abuse its discretion in finding error in the trial court’s exclusion of later oral promises and conversations as possible affirmations of the employer’s policy statements. These policy statements asserted that involuntary terminations would occur only when employees failed to perform satisfactorily, keep good attendance or were otherwise unsuited for their job. The appellate court had held that “[t]he plaintiff was entitled to have the jury determine, from this evidence, whether there was an agreement that the plaintiff would not be terminated without just cause . . . and whether that agreement was breached.”

The Connecticut Supreme Court next considered whether representations in an employer’s personnel manual may give rise to an express or implied contract and limit the employer’s right to discharge an otherwise at-will employee. The court stated that “statements in the defendant’s personnel manual were of critical importance to

105. See id.
106. See id.
107. See id. at 193, 520 A.2d at 210.
108. See id. at 192-93, 520 A.2d at 210.
110. See 202 Conn. at 196-98, 520 A.2d at 212-13. The appellate court had found reversible error in the trial court’s exclusion of oral statements concerning the alleged employment contract. See 5 Conn. App. at 398, 499 A.2d at 68-69.
111. See 202 Conn. at 197-98, 520 A.2d at 212-13.
112. See id. at 198, 520 A.2d at 213; see also 5 Conn. App. at 399-400, 499 A.2d at 69-70.
113. See 5 Conn. App. at 401, 499 A.2d at 70.
114. See id. at 402, 499 A.2d at 70 (citations omitted).
115. See 202 Conn. at 198-201, 520 A.2d at 213-15. The court agreed with the appellate court that the trial judge had erred in instructing the jury that an employment manual cannot form the basis of an employment contract. See id.
the issue of whether an express contract existed between the defendant and the plaintiff.”\textsuperscript{116} The court held that “whether the defendant's personnel manual gave rise to an express contract between the parties was a question of fact properly to be determined by a jury”\textsuperscript{117} and should not have been excluded by the trial court.\textsuperscript{118} The court also emphasized that employers could protect themselves from wrongful discharge claims based upon breach of contract by “eschewing language that could reasonably be construed as a basis for a contractual promise, or by including appropriate disclaimers of the intention to contract . . . .”\textsuperscript{119} Under the general verdict rule,\textsuperscript{120} however, the court reinstated the jury verdict for the defendant despite the erroneous instruction because the court presumed that the verdict encompassed a finding that Aetna’s termination of Finley was justified by evidence of unsatisfactory job performance.\textsuperscript{121}

In Woolley v. Hoffman-La Roche, Inc.,\textsuperscript{122} the New Jersey Supreme Court considered a factual scenario similar to that in Finley. The plaintiff, hired as an engineering manager, had worked for nine years, with two promotions.\textsuperscript{123} After his sudden termination, he asserted that he could be fired only for cause, in accordance with procedures specified in Hoffman-La Roche’s personnel handbook.\textsuperscript{124} The court emphasized the question of whether “the legal effect of the dissemination of a personal policy manual . . . [should] be determined solely . . . by traditional contract doctrine.”\textsuperscript{125}

The court then applied a unilateral contract analysis and determined that the defendant had made an offer of job security in the manual,

\textsuperscript{116} Id. at 199, 520 A.2d at 213.
\textsuperscript{117} See id. at 199, 520 A.2d at 213-14.
\textsuperscript{118} See id. at 199, 520 A.2d at 214.
\textsuperscript{119} See id. at 199 n.5, 520 A.2d at 214 n.5; see also D’Ulisse-Cupo v. Board of Directors, 202 Conn. 206, 214 (1987) (employer negligently misrepresented notice of general rehiring to employee).
\textsuperscript{120} See 202 Conn. at 202, 520 A.2d at 215. The general verdict rule provides that if a jury renders a general verdict, absent a request for interrogatories, an appellate court will presume that the jury found every issue in favor of the prevailing party. See id.
\textsuperscript{121} See id. at 202, 520 A.2d at 215.
\textsuperscript{123} See id. at 286, 491 A.2d at 1258.
\textsuperscript{124} See id. at 287, 491 A.2d at 1258. The policy manual defined the grounds for involuntary discharge: 1) layoff, caused by lack of work; 2) retirement; 3) resignation (voluntary on the initiative of the employee); 4) discharge due to performance, complete with a detailed procedure; and 5) disciplinary discharge. See id. at 287 n.2, 491 A.2d at 1259 n.2. There was no category for termination without cause. See id.
\textsuperscript{125} Id. at 289-90, 491 A.2d at 1260.
and that the employee had accepted it.\textsuperscript{126} The employee, furthermore, had supported his acceptance with the consideration of his continued employment.\textsuperscript{127} The defendant’s statements, according to the court, appeared to make “a commitment that gave workers protection against arbitrary termination.”\textsuperscript{128}

The court recognized that a prominent disclaimer would insure the employer’s unfettered right to terminate at will.\textsuperscript{129} The court, however, stated, “[t]he interests of employees, employers and the public lead to the conclusion that the common law of New Jersey should limit the right of an employer to fire an employee at will.”\textsuperscript{130}

In \textit{Ohanian v. Avis Rent A Car System, Inc.},\textsuperscript{131} the Second Circuit considered whether an employer’s oral promise of lifetime employment adequately protected a “star” sales manager from later arbitrary discharge.\textsuperscript{132} An Avis general manager induced the plaintiff to relocate from San Francisco to the Northeast with the promise that the plaintiff’s future was secure with the company, as long as he refrained from major transgressions.\textsuperscript{133} The general manager also assured Ohanian that he could move back to California if the new job was unsuccessful.\textsuperscript{134} The plaintiff later signed a form, which included language stating that employment with Avis was terminable at will and that any modification had to be in writing and signed by an executive officer.\textsuperscript{135}

After his termination, Ohanian initiated suit for wrongful discharge in violation of his oral contract.\textsuperscript{136} The court rejected the defendant’s arguments that the contract was unenforceable because it was oral and thus violated the statute of frauds.\textsuperscript{137} The court determined that the

\begin{itemize}
\item \textsuperscript{126} See \textit{id.} at 302-04, 491 A.2d at 1266-68.
\item \textsuperscript{127} See \textit{id.} at 302, 491 A.2d at 1267. Consideration, or value, must be given in exchange for the employer’s offer in order to convert that offer into a binding agreement. See \textit{id.} at 301, 491 A.2d at 1266.
\item \textsuperscript{128} \textit{Id.} at 300, 491 A.2d at 1266.
\item \textsuperscript{129} \textit{See id.} at 309, 491 A.2d at 1271.
\item \textsuperscript{130} \textit{Id.} at 291, 491 A.2d at 1261 (citing Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 511 (1980)). The court also emphasized fairness: “[A]ll that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises.” \textit{Id.} at 309, 491 A.2d at 1271.
\item \textsuperscript{131} 77 F.2d 101 (2d Cir. 1985) (interpreting New York law).
\item \textsuperscript{132} \textit{See id.} at 103.
\item \textsuperscript{133} \textit{See id.} at 104.
\item \textsuperscript{134} \textit{See id.}
\item \textsuperscript{135} \textit{See id.}
\item \textsuperscript{136} \textit{See id.}
\item \textsuperscript{137} \textit{See id.} at 105-08. The New York statute of frauds requires a signed writing
oral contract could have been terminated within one year and did not fall under the statute. In addition, the court also rejected the argument that the signed form that asserted employment at will barred any inclusion of parol evidence to establish the intent of the parties. The court upheld the jury’s finding that such a statement was not the type usually found on such forms and that plaintiff Ohanian did not intend to be bound by his signature. Finally, the court held that the plaintiff’s relocation from San Francisco to New York adequately supported his employer’s promise of lifetime employment.

3. Abusive Discharge Actions

The creation of the tort of abusive discharge represents the most revolutionary theory advanced by employees in wrongful termination suits. This theory, if consistently followed, would permanently retire the employment at will doctrine to the annals of legal history. An argument against any expansion of this theory is that a workforce that enjoys such protection will abuse it, become lazy and complacent and find ways to lower productivity down to but not quite meeting to enforce contracts that cannot be performed within one year. See N.Y. Gen. Oblig. Law § 5-701(a)(1) (McKinney 1986).

138. See 779 F.2d at 108.
139. See id. at 108-09. The parol evidence rule is a fundamental principle of contract law that prohibits any written agreement between the parties to be changed by oral evidence. Id.
140. See id.
141. See id.
142. See id.
143. See Larson & Borowsky, supra note 4, § 4.02, at 4-2 to -10.
145. Professor Summers states:

[J]udicial acceptance of the employment at will doctrine effectively eliminated for most workers all rights as to the future from the contract of employment, and thereby drained it of all substantial content . . . . When employment is at will, contractual rights and duties largely disappear or become empty shells, for rights and duties arising out of continuing relationship can have little substance when either party can terminate the relationship at any moment for no reason.

The Rights of Individual Workers, supra note 4, at 1085. The historical development of employment at will from Wood’s rule met the needs of a developing American industrial economy. See supra notes 41-45 and accompanying text. Yet, modern conceptions of fairness and equality require legal inquiry into the viability of this doctrine. It is mere rationalization to assert that workers will by nature bear the “inequalities of fortune,” supra note 45, during the employment relationship.
the standards set for a "just cause" for termination stipulation.\textsuperscript{146} The tort of abusive discharge is an amalgam of theories advanced under the public policy exception.\textsuperscript{147} The tort can be "based upon a finding that the discharge was motivated by malice, bad faith, or retaliation."\textsuperscript{148} At least one state has held that a discharge motivated by malicious intent to harm the employee is, in itself, a violation of public policy.\textsuperscript{149} No forthright public policy protection, however, ensures security and fair treatment in employment.\textsuperscript{150} Yet, "tort law is entirely concerned with public policy—the policy that individuals be secure in their person and belongings."\textsuperscript{151} The adoption of tort law concepts to treatment of employees appears fair, given the special power of intimidation of employers\textsuperscript{152} and the complete dependence of the employee on his wages.\textsuperscript{153} Successful actions in tort, however, would expose employers to risks involving punitive damages.\textsuperscript{154}

Abusive discharge may include the tort action of intentional infliction of emotional distress.\textsuperscript{155} Courts, however, are reluctant to act on an employee's accusations unless the employer's conduct exceeds

\textsuperscript{146} Certain "good cause" for termination would include unsatisfactory performance or incapacity to perform the job, product discontinuance or permanent work stoppage. See supra note 85 and accompanying text. Employees, however, could perform the least amount of work required to complete the task in order to avoid triggering a "good cause" termination standard.

\textsuperscript{147} Larson & Borowsky, supra note 4, § 4.02, at 4-2.

\textsuperscript{148} See id.

\textsuperscript{149} See id.

\textsuperscript{150} In Pennsylvania, two courts have held that such a discharge violates public policy, although the employees were not able to proceed successfully in wrongful discharge suits due to other factors. See Boresen v. Rohm & Haas, Inc., 526 F. Supp. 1230 (E.D. Pa. 1981), aff'd, 729 F.2d 1445 (3d Cir. 1984); see also McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979) (plaintiff successfully proved that his discharge was motivated by specific intent to harm him). This "bad faith" termination exception to employment at will is "a broader basis of liability than the 'public policy' exception. In its pure form, the focus would be entirely on the wrong done to the employee himself and not on any particular public policy." Larson & Borowsky, supra note 4, § 4.02, at 4-4. The tort of abusive discharge was first indicated in Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). See Public Policy Limitations to the Employment-At-Will Doctrine, supra note 60, at 1121-22.

\textsuperscript{151} See Larson & Borowsky, supra note 3, § 4.02, at 4-4.

\textsuperscript{152} Employees are inescapably vulnerable to economic forces and are vulnerable to employer abuse, given the inequality of the parties and the power an employer has over the employee's livelihood. See The Rights of Individual Workers, supra note 4, at 1106.

\textsuperscript{153} See id.


\textsuperscript{155} See Restatement (Second) of Torts § 46 (1965).
"all bounds usually tolerated by decent society . . . ." The difficulty arises when the employer's conduct during the termination process is offensive and outrageous but does not meet the requirement of being so outrageous as to exceed society's tolerance. The employee must then rely upon judicial consideration of the specific facts of the discharge. Another difficult situation occurs when the employer's conduct involves racial or sexual harassment; the employee's common-law action for intentional infliction of emotional distress may then be preempted by statutory prohibition of such discriminatory action.

Other tort actions brought by employees include fraud, inten-
tional interference with contract,\textsuperscript{161} prima facie tort\textsuperscript{162} and negligence.\textsuperscript{163} The fundamental argument against further expansion of abusive discharge and its related tort actions is that any such expansion should be decided by the legislature.\textsuperscript{164} In addition, recovery in tort with the possibility of punitive damages would severely increase the potential burden on employees in planning for such liability.\textsuperscript{165}

4. \textit{The Implied Covenant of Good Faith and Fair Dealing}

The implied covenant of good faith and fair dealing is a concept that exists in most commercial contracts.\textsuperscript{166} This covenant assumes that neither party to an agreement will interfere with the other party's right to receive the benefit of the bargain.\textsuperscript{167} An express employment contract specifying the length of the hiring or the terms of compensation usually is presumed to contain such a covenant.\textsuperscript{168}

\begin{footnotesize}

\textsuperscript{162} See, e.g., Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303-04, 448 N.E.2d 86, 90-92, 461 N.Y.S.2d 232, 236-37 (1983) (plaintiff's assertion of prima facie tort failed to emphasize absence of social or economic justification for discharge or prove malice sufficiently; consequently, court would not permit plaintiff to "bootstrap" himself due to unavailability of wrongful discharge tort).


\textsuperscript{164} See, e.g., Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 301-02, 448 N.E.2d 86, 90, 461 N.Y.S.2d 232, 235-36 (1983). The New York Court of Appeals stated that the legislative branch possessed "infinitely greater resources and procedural means to discern the public will, to examine . . . [s]tandards . . . applicable to the multifarious types of employment and the various circumstances of discharge." \textit{Id.} at 302, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 236.

\textsuperscript{165} See \textit{Punitive Damages, supra} note 154, at 472-96; \textit{see also} Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983). In \textit{Brockmeyer}, the Wisconsin Supreme Court emphasized that wrongful discharge awards should be limited to reinstatement and back pay, which are traditional contractual remedies, because those damages are foreseeable and open to possible mitigation. \textit{See id.} at 841.

\textsuperscript{166} See U.C.C. \S 1-203 (1978).


\textsuperscript{168} The collective bargaining agreement creates "legally enforceable contract rights in the individual. One function . . . was to give life and meaning to the individual contract of employment." \textit{The Rights of Individual Workers, supra} note 4, at 1088. "If the contract is ambiguous, or the facts are in dispute, the union is entitled to resolve the ambiguity and to make a reasoned judgment of the facts
But an at-will employee traditionally has no such contractual rights and receives no protection from the presumption.\textsuperscript{169}

The distinction between a contract action for breach of the covenant of good faith and fair dealing and a tort action for abusive discharge based upon malice is blurred.\textsuperscript{170} One could describe the breach of this covenant as a violation of public policy, and thus characterize the action as a tort.\textsuperscript{171} Characterizing the action as a tort opens up the possibility of punitive damages.\textsuperscript{172}

The California Supreme Court has stated that there is "an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."\textsuperscript{173} In \textit{Cleary v. American Airlines, Inc.},\textsuperscript{174} the plaintiff, because his employer had suddenly terminated him after eighteen years of service, brought suit for

\textbf{\ldots The union's advocacy of that result fulfills its duty to enforce the contract rights of those it represents.} Id. at 1096. The unionized employee, therefore, enjoys a broader interpretation of his rights under an express bargaining agreement. \textit{See, e.g.}, Rosecrans v. Intermountain Soap & Chem. Co., 100 Idaho 783, 605 P.2d 963 (1980).

169. All that an employee at will can hope for, absent express limitations on his employer's termination right, is for a court to broadly construe the implied good faith covenant based upon his years of service, and his reliance on employer's assurances and other quasi-contractual manifestations. \textit{See Cleary v. American Airlines, Inc.}, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (employer estopped from firing employee without good cause after eighteen years of satisfactory service); \textit{see also} Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (employee terminated after thirty-two years of service in violation of employer's implied promise of fair dealing). Professor Summers stated:

\textit{[T]he implied obligation of good faith and fair dealing must play a central role in contracts of employment. The contract establishes a continuing relationship that requires a substantial measure of mutual trust and confidence. Spelling out all of the terms in advance is impossible, for the relationship changes, often in an evolutionary process that reshapes rights and duties without explicit recognition . . . . The parties must rely on the implicit understanding that each will show respect for the other's interests . . . .}

\textit{The Rights of Individual Workers, supra} note 4, at 1106.

170. \textit{Larson & Borowsky, supra} note 3, \S\ 4.02, at 4-9.

171. If the implied covenant of good faith and fair dealing is presumed in every express and implied contract, a public policy presumption is also raised that this good faith requirement is to be encouraged between all contracting parties. \textit{See Breach of Contract, supra} note 167, at 386-87.

172. A breach of the implied covenant would violate public policy and could create a cause of action in tort for actual and punitive damages. \textit{See Punitive Damages, supra} note 154, at 472-96.


compensation and punitive damages. The California Court of Appeals held that a breach of this implied covenant sounds in both contract and tort and awarded both contractual and punitive damages. The court in Cleary relied on analysis originated by the California Supreme Court in Tameny v. Atlantic Richfield Co., and stated that the covenant of good faith and fair dealing is "unconditional and independent in nature," and should be recognized because "certain . . . rights to job security [are] necessary to ensure social stability in our society." Two important factors in the court's decision were: (1) the length of the employee's service, and (2) the fact that the employer had violated the express termination procedures outlined by company policy.

In a later decision, however, the court decided in favor of a terminated employee who had worked for his employer for thirty-two years, and did not require the employee to prove that the employer violated a termination procedure. Five states have applied the implied covenant of good faith and fair dealing to employment relationships.

III. Models of Resolution

The inherent problem in developing models of resolution for the employment at will controversy is the conflict between economic

175. Id. at 446-47, 168 Cal. Rptr. at 723-24.
176. Id. at 455-56, 168 Cal. Rptr. at 729.
179. Id. at 455, 168 Cal. Rptr. at 729.
180. Id. at 455-56, 168 Cal. Rptr. at 729. The court held that "longevity of the employee's service, together with the expressed policy of the employer, operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause." Id. at 456, 168 Cal. Rptr. at 729.
181. See Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 328-29, 171 Cal. Rptr. 917, 927 (1981); see also Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.), cert. denied, 459 U.S. 859 (1982) (employee must allege longevity of service and other personnel policies to prove implied covenant of good faith exists).
182. The following state courts have found an implied covenant of good faith and fair dealing in employment contracts: Alaska, see Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); California, see Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980); Connecticut, see Cook
efficiency and the expansion of employees’ rights. Employers are in business to make a profit, which entails the consumption of resources, the sale of goods or services and the accumulation of capital. For employers, workers’ output is a resource that they must manage efficiently in order to maximize profit levels. The needs of employees for greater job security and freedom from arbitrary treatment appear to conflict directly with this efficiency theory.

A. Unionization as a Remedy

Professor Stieber, professor of economics and director at the School of Labor and Industrial Relations at Michigan State University, has stated that:

In principle there is widespread agreement that the employment-at-will doctrine has no economic or moral justification in a modern industrialized Nation. The idea that there is equity in a rule under which the individual employee and the employer have the same right to terminate an employment relationship at will is obviously fictional in a society in which most workers are dependent upon employers for their livelihood.

A solution to this problem is to encourage employees at will who want protection from unjust termination to organize and form a union. Although most collective bargaining agreements are express employment contracts with protection against arbitrary discharge, and incorporate the implied covenant of good faith and fair dealing, a difficulty arises when workers cannot achieve a fifty-one percent majority vote needed to unionize. In addition, the continued decline in the number of employees who have joined unions reveals the illusory aspect of this solution.

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183. See generally Feinman, supra note 27, at 132-33.
184. See id.
185. See id.
186. Stieber, supra note 2, at 36.
187. Id.
188. See supra notes 143-65 and accompanying text.
189. See supra notes 166-82 and accompanying text.
191. Stieber, supra note 2, at 36-37; Finkin, supra note 2, at 727.
B. Judicial Decree as a Progressive Solution

Inconsistent judicial response to wrongful discharge litigation has created a patchwork of decisions across the country. The degree of responsiveness varies from the rigid affirmation of traditional at-will principles to the broad expansion of an implied good faith covenant in most long-term employment relationships. An employee's rights in a wrongful discharge case are therefore predetermined by the trend in the law of her workplace or residence. Indeed, some courts have retreated from a previously progressive position to a reaffirmation of employment at will. Judicial balancing of an employer/employee controversy may be subjectively colored by the heavy weight of precedent the employment at will doctrine bears and by the fact that policy considerations in favor of maintaining an attractive environment for businesses outweigh the rights of a single employee. Judicial balancing, however, should analyze the totality of the circumstances in an unjust dismissal case in which the employer asserts disclaimers as an absolute de-

192. See The Public Policy Exception, supra note 4, at 1950.
193. See supra note 72 and accompanying text.
194. See Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); see also supra notes 166-82 and accompanying text.
195. Professor Blades states that while the employer's right to fire an at-will employee is lawful, "the law should not allow the employer to exercise his right of discharge in order to effectuate a purpose ulterior to that for which the right was designed." Blades, supra note 4, at 1424. Blades also stated that questions of the possibility of employee mobility should also be addressed because "the employee who has enough mobility to avoid the consequences of his discharge will also have enough mobility to make him an unlikely target for oppression by the employer. But where the employee's experience is of special value only in his present employment ... he is more susceptible to improper exertion of the employer's power ... " Id. at 1426.
197. The balance of power is intrinsically weighted in favor of the employer at the outset of an employment at will relationship:
The owner of capital—the employer—and the non-owner of capital—the employee—enter into a wage bargain by which the employer becomes entitled to the worker's labor ... the benefit to the worker is that wage labor is his sole source of subsistence ... . The [employment at will] rule transformed long-term and semi-permanent relationships into non-binding agreements ... [i]f employees could be dismissed on a moment's notice, obviously they could not claim a voice in the determination of the conditions of work or the use of the product of their labor.
Disclaimers that employers prominently place in employment applications and personnel manuals should be signed by employees and by employers in order to assure that the employee is aware of her employer’s policies. Yet, disclaimers merely provide one factor in the analysis of a wrongful discharge case and should be balanced carefully against other manifestations by the employer of potential job security. In addition, courts may analyze these disclaimers as contracts of adhesion.

C. Voluntary Action by Individual Employers as a Remedy

The American Arbitration Association advocates voluntary action by employers to provide due process for discharged employees. This solution is an alternative solution to compulsory labor-management relations. Voluntary action on the record, however, “provides little basis for optimism.” Most nonunion employees hesitate to

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Feinman, supra note 27, at 132-33; see also Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 469, 443 N.E.2d 441, 441, 457 N.Y.S.2d 193, 199 (1982) ("[a] less savory result of imposing additional restrictions on the ability to discharge an employee . . . is that businesses and industry, the major employers in New York will simply move elsewhere") (Wachtler, J., dissenting).

198. See Morris v. Chem-Lawn Corp., 541 F. Supp. 479, 481 (E.D. Mich. 1982) (while plaintiff’s claim for wrongful discharge was dismissed, court analyzed disclaimers on three separate employment agreements and found disclaimers silent as to good cause for termination); see Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344, 346 (E.D. Mich. 1980) (disclaimer that included provisions for termination with or without cause at any time prevented employee from suing for wrongful discharge).

199. See Decker, Handbooks And Employment Policies As Express Or Implied Guarantees Of Employment—Employer Beware. 5 J. L. & COM. 207, 220-21, 26 [hereinafter Decker].


201. See Decker, supra note 199, at 222. Disclaimers may be “invalid because of the disparity in bargaining power between the employer and employee . . . . As the at-will employment doctrine is subjected to closer scrutiny, employers should anticipate that disclaimers may be questioned as exhibiting this inequality in bargaining power between employer and employee.” Id.

202. Due process of law for at-will employees involves protection against arbitrary, capricious, unfair and discriminatory discharge, see Howlett, Due Process for Nonunionized Employees: A Practical Proposal, 32ND ANNUAL PROCEEDINGS, INDUSTRIAL RELATIONS RESEARCH ASS’N 164 (1979) [hereinafter Howlett].

203. Stieber, supra note 2, at 37. See generally Robins, Unfair Dismissal: Emerging Issues In The Use Of Arbitration As A Dispute Resolution Alternative For The Non-Union Workforce, 12 FORDHAM URB. L.J. 437 (1984) (an analysis of the mechanics of the arbitration process as applied towards nonorganized workers) [hereinafter Robins].

204. See id. at 441-44.

205. Stieber, supra note 2, at 37.
use internal complaint procedures and rarely appeal unfavorable decisions. Employers may, however, benefit from progressive disciplinary and termination procedures because of improved worker morale. Many employers forgo the opportunity to develop fair, binding internal complaint procedures and instead choose to rely upon disclaimers in all personnel documents. These disclaimers, however, may be rendered unconscionable in an analogy to contracts of adhesion decisions. In addition, employees may not realize the full import of written disclaimers upon their rights. The extra effort and foresight of progressive companies in the development of fairer policies, including binding review panels for termination disputes, should reduce the likelihood of potential lawsuits and improve profitability with the development of a loyal, informed workforce.

D. Legislation as a Viable Solution

As noted in Murphy v. American Home Products Corp., legislative bodies are better equipped than the courts to grapple with the employment at will issue. Some commentators advocate the adoption of comprehensive federal legislation to protect employees at will from unjust discharge. Other commentators have proposed legislative reform on the state level. These statutory solutions

207. See Brady, supra note 5, at 59-69.
208. See supra notes 96-97 and accompanying text.
209. See The Rights of Individual Workers, supra note 4, at 1106-7. Contracts of adhesion are rarely bargained for between equals; in employment situations, the employer "dictates the terms and reserves wide latitude in changing those terms as the employment continues." Id. at 1106.
210. See id. at 1107. Moreover, "[t]he potential for overreaching [by the employer] is pervasive and ever present; the law here, as in consumer contracts, has a responsibility to protect the weaker party." Id.
211. See Robins, supra note 203, at 446-57.
213. Id. at 302, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 236.
215. See Bellace, supra note 56, at 231-47; Howlett, supra note 202, at 166-70; Time for a Statute, supra note 4, at 519-32. Professor Summers stated, "[A]ny realistic hope for increased legal protection of employees must look for fulfillment to legislation, for the courts have thus far shown an unwillingness to break through their self-created crust of legal doctrine." Time for a Statute, supra note 4, at 521; see also Note, Reforming At-Will Employment Law: A Model Statute, 16 U. Mich. J.L. Ref. 389, 404-34 (1983).
channel wrongful discharge claims into pre-existing arbitration mechanisms or other established tribunals.216 These proposals, however, do not fully address the increased cost of administering independent unjust dismissal arbitration programs.217

One issue that should be addressed on the state legislative level is the validity of employer disclaimers on employment literature.218 As the controversy over the current status of the employment doctrine continues, employer disclaimers will no doubt proliferate as a first line defense to wrongful discharge suits.219 In order to address the problems these disclaimers raise, such as unequal bargaining power between the parties220 or the creation of possible contracts of adhesion;221 legislatures must balance employers' fears of disseminating any personnel literature that might be misconstrued with the employees' need to rely upon employer representations. Personnel handbooks and related literature serve both management and workers by promoting communication, outlining policy and describing benefits and responsibilities.222 Legislative prohibition of employer disclaimers may eventually cause employers to refuse to disseminate personnel literature.223

IV. Conclusion

The preceding analysis has shown that modification and restructuring of the traditional employment at will doctrine towards a more progressive, flexible approach redresses a hundred-year-old wrong against employees. While employers will undoubtedly bear additional administrative costs, they will benefit from a more loyal and productive workforce in the long run and may ultimately improve profitability.

216. See The Need for a Federal Statute, supra note 214, at 340 (discussing arbitration selection procedures for unjust discharge cases); Howlett, supra note 202, at 168-70 (discussing possible mediation-arbitration system of review); Time for a Statute, supra note 4, at 521-32 (discussing arbitration procedures); see also Bellace, supra note 56, at 232-47 (proposing statutory guarantee against unfair dismissal enforced through same state procedures used for unemployment compensation claims).
217. See Schauer, Discussion, 32ND ANNUAL PROCEEDINGS, INDUSTRIAL RELATIONS RESEARCH ASS'N 183, 183-86 (1979) (advocating adoption of voluntary discharge appeal procedures as more cost-efficient).
218. See supra note 96 and accompanying text.
220. See id. at 222.
221. See supra note 209 and accompanying text.
222. See Decker, supra note 199, at 210-12.
223. See id. at 223-30.
In a reluctant way, the courts and legislatures are addressing a profound shift in labor philosophy and psychology. This shift is from an inhospitable, adversarial employee/employer relationship to one concerned with performance and fundamentally based upon principles of fairness and equal treatment. Judicial support given to prominent disclaimers in employee handbooks retards this progress, as does narrow legislative interpretation or, worse yet, no legislative reaction at all. Responsible employers will agree and respond to this development, while those who prefer to adhere strictly to the employment at will doctrine will suffer the gradual loss of their workers to more equitable environments.

The ultimate solution to employment at will is to balance employees' needs for fair treatment with employers' needs to maintain efficient productivity. The business community may continue to advocate that "the most enlightened judicial [and legislative] policy is to let people manage their own business their own way." The developing trend, however, in employer/employee relationships is to balance the equities of fortune and require fair, consistently applied termination procedures for just cause, rather than permit unfettered termination at will.

Patricia M. Lenard

224. Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 411 (1911).